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Congress of the United States

House of Representatives

Washington, DC 20515

NYDIA M. VELAZQUEZ

12TH DISTRICT, NEW YORK

July 24, 2000

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Ms. Anne Goode
Director, Office of Civil Rights
United States Environmental Protection Agency
401 M Street, SW
Washington, D.C. 20460

7R-00-R2

Dear Ms. Goode:

This letter serves as a complaint based upon Title VI of the Civil Rights Act of 1964, U.S. C. §2000d et seq. New York. I write this letter on behalf of myself, concerned citizens and the following community groups: Boroughs Allied for Recycling and Garbage Equity (BARGE), Cobble Hill Association, Groups Against Garbage Sites (GAGS), Neighbors Against Garbage (NAG), and the Red Hook Civic Association and various other civic organizations.

ASSERTIONS

The basis of this complaint arises from the discriminatory siting and concentration of waste transfer stations and other hazardous substance handling facilities in the **Red Hook** area of **Brooklyn**. It is our assertion that these facilities, have had an adverse effect on the health and environment on the persons within this community.

Based upon the conduct of the New York City Department of Sanitation (DOS), we assert that 1) DOS, without having performed an environmental review as required by the State Environmental Quality Review act (SEQRA), found at Article 8 of the Environmental Conservation Law (ECL), and regulations promulgated thereunder, is unlawful, arbitrary, capricious, and an abuse of discretion; 2) DOS issued the permit in violation of the siting regulations for new and expanded solid waste transfer stations (siting regulations) codified at Chapter 4 of Title 16 of the Rules of the City of New York (RCNY); 3) DOS does not have authority to issue a permit because the siting regulations are invalid under Local Law 40, found at New York City Administrative Code §16-131(b), and SEQRA.

Demographics

According to the 1990 Census, Red Hook has a population of approximately 11,000 which was composed of 7.5% non-Hispanic Whites, 49.1% non-Hispanic Blacks, and 42.5% Hispanics. Seventy-three percent of the population resides in a single public housing development - Red Hook Houses.

Over one-third of Red Hook's population is below 18 years of age and the proportion is even higher within Red Hook Houses. Over half the population lives below the poverty level, according to the U.S. Census. Unemployment rates in Red Hook are three times the Brooklyn average for males and almost two and a half times the Brooklyn average for females. Forty-four percent of persons aged 25 years and over do not have a high school diploma.

NEGATIVE CUMULATIVE IMPACT

This community is overburdened not only with waste transfer stations but also other facilities which pose significant health and environmental threats. In Red Hook, there are 6 waste transfer stations, 7 sites that may warrant Superfund designation, 3 hazardous waste facilities, and a toxic release inventory site.

Inequitable Zoning

Red Hook residents are concerned that their community which is made up largely of minority residents—more than half of which have incomes below the poverty level—are not zoned similarly to more affluent communities. They noted that permitted waste transfer stations (WTSs) must be in industrial zones; however, more affluent communities have been re-zoned to become exclusively residential, while low-income and minority communities are forced to live with industry. In Red Hook, one low-income housing development is located within one block of a WTS.

In addition to their concern about non-equitable zoning, Red Hook residents fear that they will continue to be cut off from access to the waterfront and scenic views of the Verrazano Narrows Bridge, the Statue of Liberty, Ellis Island, and Manhattan because of WTSs and other industrial facilities.

Negative Zoning Patterns

Predetermination to locate negative land-use facilities (including WTSs) in or adjacent to certain communities occurs when these facilities are permitted only within certain areas. Communities typically predetermined for negative land uses include residential zones that were grand-fathered into industrial zones, residential zones that are adjacent to industrial zones, or zones that permit a mixture of residential, commercial, and certain industrial activities. These communities predominantly consist of residents that are poor and of color. Predetermination is exacerbated by rezoning decisions that eliminate negative land uses in affluent white communities, thereby further limiting WTSs to low-income communities and communities of color.

The limited areas in which WTSs can be established are permitted generally "as a matter of right." This means that the local permitting agencies have no discretion to deny such use, nor do impacted communities have the opportunity to review or object to such use.

Currently there is no systematic process to safely and fairly select sites for WTSs. Along with predetermination the lack of a systematic process has led to the clustering of these facilities in poor minority communities. Factors that contribute to the problem of site selection of WTSs include the bifurcation of the commercial and residential solid waste streams (often by municipal government action), the large number of commercial service providers, localized increases in tipping fees, flow control and other manipulations of market choice, and inadequate and unclear regulatory criteria.

NEW YORK CITY REGULATORY AUTHORITY

Waste transfer facilities are governed by Title 16 Chapter 4 of the Rules of the City of New York (RCNY), Department of Sanitation, regulates non-putrescible solid waste transfer stations. This regulation requires that any person who owns, operates, maintains, or controls a non-putrescible solid waste transfer station shall comply with the following: 1) the state Environmental Conservation Law and all permit conditions stated in any permit issued ; 2) Titles 16 and 24 of the Administrative Codes of the City of New York (Air Pollution and Noise Control); 3) Subchapter 3 of Chapter 1 of Title 26, and Chapter 1 of Title 27 of the Administrative Code of the City of New York (Building Code); 4) the Zoning Resolution of the City of New York; 5) the New York City Health Code; 5) and all other applicable local and state laws and rules including general transportation and vehicular transport routes.

Construction and demolition debris waste transfer stations

Permits are required for construction and demolition debris transfer stations, and such stations must comply with Title 16 RCNY §14-06 and 16 RCNY §4-05. This regulation requires that adequate ventilation and sufficient space for ingress and egress (including the ability to accommodate emergency vehicles) and facilitating complete inspection of the transfer stations must be maintained. In addition, construction and demolition debris transfer stations must be operated so as to avoid any nuisance or condition hazardous to public health or safety and must be kept free of all vectors, such as rodents, insects, other pests, and conditions conducive to vectors. They also are required to have on-site proof of weekly engagement of certified exterminators. Transfer stations are not permitted to emit odors (including those of deodorizing materials) so as to violate the odor or air pollution codes of the Administrative Code of the City of New York. In an unenclosed facility located 300 feet or less from a residential zone, non-putrescible waste may not be maintained in piles greater than 8 feet high. Bay doors are required to be kept closed unless vehicles are entering or exiting. Vehicle exhausts must be vented through filters, and no burning is permitted at transfer stations. Permits are required for fill material transfer stations by 16 RCNY § 4-07. Operation and maintenance of fill material transfer stations are governed by 16 RCNY §4-08.

Putrescible solid waste transfer stations

Putrescible solid waste transfer stations also are regulated by the Rules of the City of New York. 16 (RCNY §4-11). Like non-putrescible solid waste transfer stations, putrescible solid waste transfer stations are required to comply with all state and local laws and rules, including general transportation and vehicle transport routes. Permits must include written plans for the control of noise and odors (16 RCNY §4-14). Permits are subject to suspension and revocation for violation of the terms of Chapter 4 or any applicable section of the Administrative Code or any other applicable permit condition, law, or rule. Design and equipment requirements are set forth in 16 RCNY §4-16; operation and maintenance rules are set forth in 16 RCNY §4-17.

Permit Program

Title 16 of NYCAC mandates permits for operators of dumps, non-putrescible and putrescible waste transfer stations, and fill material operations (16 NYCAC §116-130). This section prohibits any person or public agency other than the Department of Sanitation from operating a dump, solid waste transfer station, or fill material operation without a permit. The Department's Commissioner has the power to adopt rules for the operation of waste transfer stations and is required to adopt rules in consultation with the commissioners of health and environmental protection for the protection of public health and the environment (16 NYCAC §16-131). These rules can include regulation of siting, hours of operation, noise, odor control, ventilation, and other matters pertaining to waste transfer station operation.

NEW YORK STATE REGULATORY AUTHORITY

In New York City, state and local laws govern the operation of waste transfer stations. Titles 9, 11, and 13 of Article 27 of the state Environmental Conservation Law (ECL) provide for the treatment and disposal of solid and hazardous waste through the Solid Waste Management Plan which is updated and overseen by the New York State Department of Environmental Conservation (NYSDEC). Article 71 provides strong enforcement authority for the Environmental Conservation Law and prohibits, among other things, "depositing unwholesome substances on or near a highway or route of public travel, or on land or water" (NY ECL §71-3501). Violation of ECL §71-3501 is punishable as a misdemeanor. NYSDEC is authorized to regulate the operation of solid waste management facilities to prevent or reduce air, water, and noise pollution as well as odor, litter, flies, vermin, and other conditions affecting the public health, safety and welfare.

NYSDEC has issued detailed regulations pertaining to the operation of waste transfer stations. Construction and demolition debris landfills are governed by 6 NYCRR §360-7. This section also governs land-clearing debris landfills of 3 acres or less in size. Construction and demolition debris processing facilities are governed by 6 NYCRR §360-16. Regulated medical waste transfer stations are governed by 6 NYCRR §360-10,17; and a permit is required to construct and operate these facilities. Facilities that transfer or process solid waste are governed by 6 NYCRR §360-11. A permit is required to construct and operate a solid waste transfer station. Design requirements for waste transfer stations are set forth in 6 NYCRR §360-11.3, and operational requirements are found in §360-11.4.

FEDERAL AUTHORITY

Pursuant to RCRA Sections 6942 and 6947, EPA has sufficient authority to initiate a better planning process for WTS siting and operation to reduce the impact on adjacent communities and the environment. In addition, EPA has jurisdiction over WTSs under Title V of the Clean Air due to the odors and particulate matter which emanate from these facilities.

DISCRIMINATORY ACTS WITHIN 180 DAYS

Brooklyn Crushed Materials

On or about June 25, 1998, Brooklyn Crushed Materials, Inc. (BCM) filed a registration for a proposed waste transfer station with the New York State Department of Environmental Conservation (DEC). The registration form proposed to operate a facility at 640 Columbia Street, Brooklyn, New York. The quantity of waste to be processed daily was listed at approximately 5,000 tons per day with a storage site capacity of approximately 20,000 tons.(See attachment)

The proposed site is located where Recycling Unlimited Inc. previously operated a Construction and Demolition debris processing facility. According to a letter dated July 6, 1998 for DEC, the DOS ordered the facility to stop accepting material and close. This site has not been used and since its closure in November of 1996. Furthermore, DEC notified BCM despite the closure of Recycling Unlimited Inc. in November 1996, the site was never properly closed, cleared or cleaned up. BCM was advised that there were several pending violations which must be resolved before BCM's registration would be accepted by the DEC.(See attachment.)

Despite BCM's failure to complete the clean-up and to receive a registration from DEC, on or about September 9, 1998, BCM attempted to file an application for a permit for a proposed fill material transfer station with the DOS. The application was filed as a new application to open a new facility. The application also indicates that the amount of material to be processed daily will be approximately 1,000 tons daily, requiring up to 110 truck stops daily. (See attachment.)

Under Title 16 of the Rules of the City of New York (RCNY), section 4-03, no person shall operate a transfer station without receiving a permit from DOS. According to the general instructions printed on the DOS permit application, an "original application" is a "completed application with original signatures" (emphasis added) (see Transfer Station Permit Application) A complete application for a Fill Material Transfer Station must include the seventeen (17) items listed under 16 RC NY § 4-07. (See attachment.)

BCM's application failed to include 12 out of 17 required items, including but not limited to: 1) a certificate of Occupancy as required by 16 RCNY §4-07(b)(5); 2) documentary evidence that all penalties imposed upon the applicant or property owner were satisfied pursuant to 16 RCNY §4-07(b)(6); 3) proof of workers' compensation coverage pursuant to 16 RCNY §4-07(b)(8); 4) a written and notarized acknowledgement that the applicant or owner can be held primarily liable for the removal of all material from the transfer station pursuant to 16 RCNY § 4-07(b)(9); 5) copies of all materials submitted to the Department of Environmental Conservation pursuant to 16 RCNY § 4-07(b)(1); and 6) a site plan pursuant to 16 RCNY § 4-07 (b)(1). (See attachment - DOS letter dated 9-20-98.)

In a letter dated October 19, 1998, BCM submitted by hand several of the missing items. These additional items did not complete the application. (See attachment). In letters dated October 21, 1998, and November 13, 1998, the DOS advised BCM of the remaining documents necessary to complete the fill material transfer station permit application. In addition, BCM's letter dated December 9, 1998 indicated that BCM did not have a current Certificate of Occupancy. On June 14, 1999, BCM was still submitting documents required by the regulations to be filed with the initial permit application. (See Attachment.)

On or about June 17, 1999, the DOS advised BCM that the department considered its application to operate a fill material transfer station complete, despite having never received proof of a current Certificate of Occupancy for the entire site. See Attachment.)

16 RCNY §4-07(c) states that "any initial application for a transfer station permit shall include all documentation required pursuant to [16 RCNY § 4-07] in one single package." (See attachment.) The package submitted by BCM on September 9, 1998 was so deficient, it did not constitute a valid transfer station permit application. Moreover, the permit application is still incomplete, thereby violating 6 RCNY §4-07.

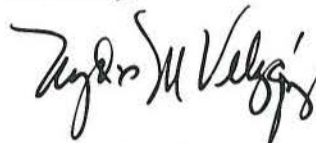
DOS promulgated siting regulations for new and expanded solid waste transfer stations, effective October 24, 1998 ("siting regulations"). Under 16 RCNY §4-42(b)(1), a new non-putrescible solid waste transfer stations is one that prior to October 24, 1998 had not filed a permit application and an environmental assessment statement.

Based upon the aforementioned, the City of New York systematically ignored and violated regulations pertaining to the siting and permitting of waste transfer facilities. The Brooklyn Crushed materials is but only one example of the blatant disregard exhibited by DOS in relation to waste transfers facilities. As a result, the surrounding communities are exposed to conditions which were detrimental to their health and environment.

CONCLUSION

Based upon the aforementioned, we ask that you exercise your authority to correct the disparate impact felt by the Red Hook community in the 12th Congressional District of New York. We ask that you immediately call upon the City to correct its oppressive conduct with regard to the permitting of waste transfer stations and other facilities that have the potential to have a negative impact on the surrounding community. In addition, we implore you to conduct an assessment of the State of New York's oversight of the City's waste management plan in light of its undue burden on minority and low-income communities as well as its blatant violation of state law.

Sincerely,



Nydia M. Velázquez
Member of Congress
12th District of New York

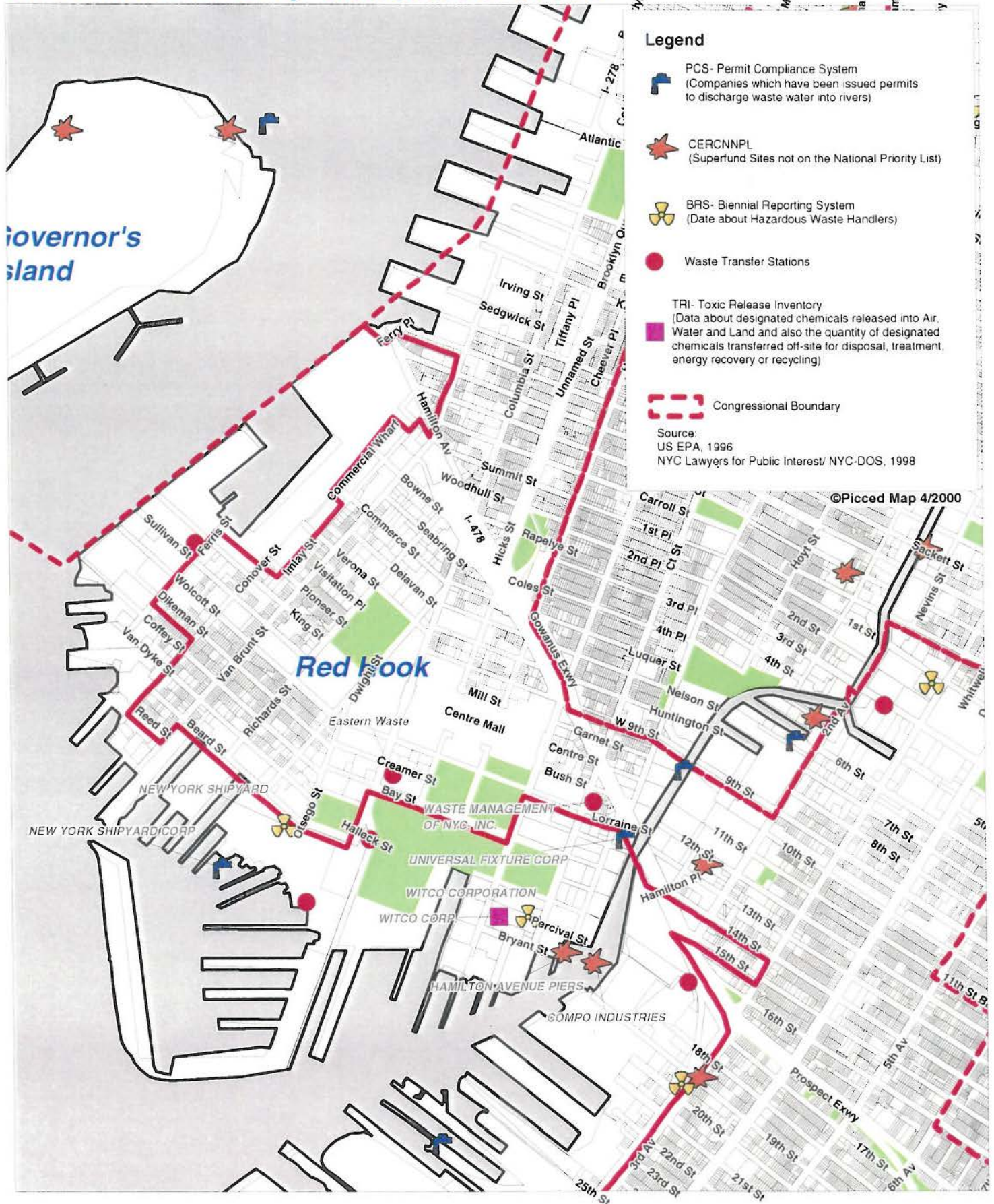
Additional signatories:

The Honorable Martin Connor - New York State Senate
The Honorable Kenneth K. Fisher - New York City Council
The Honorable Angel Rodriguez - New York City Council

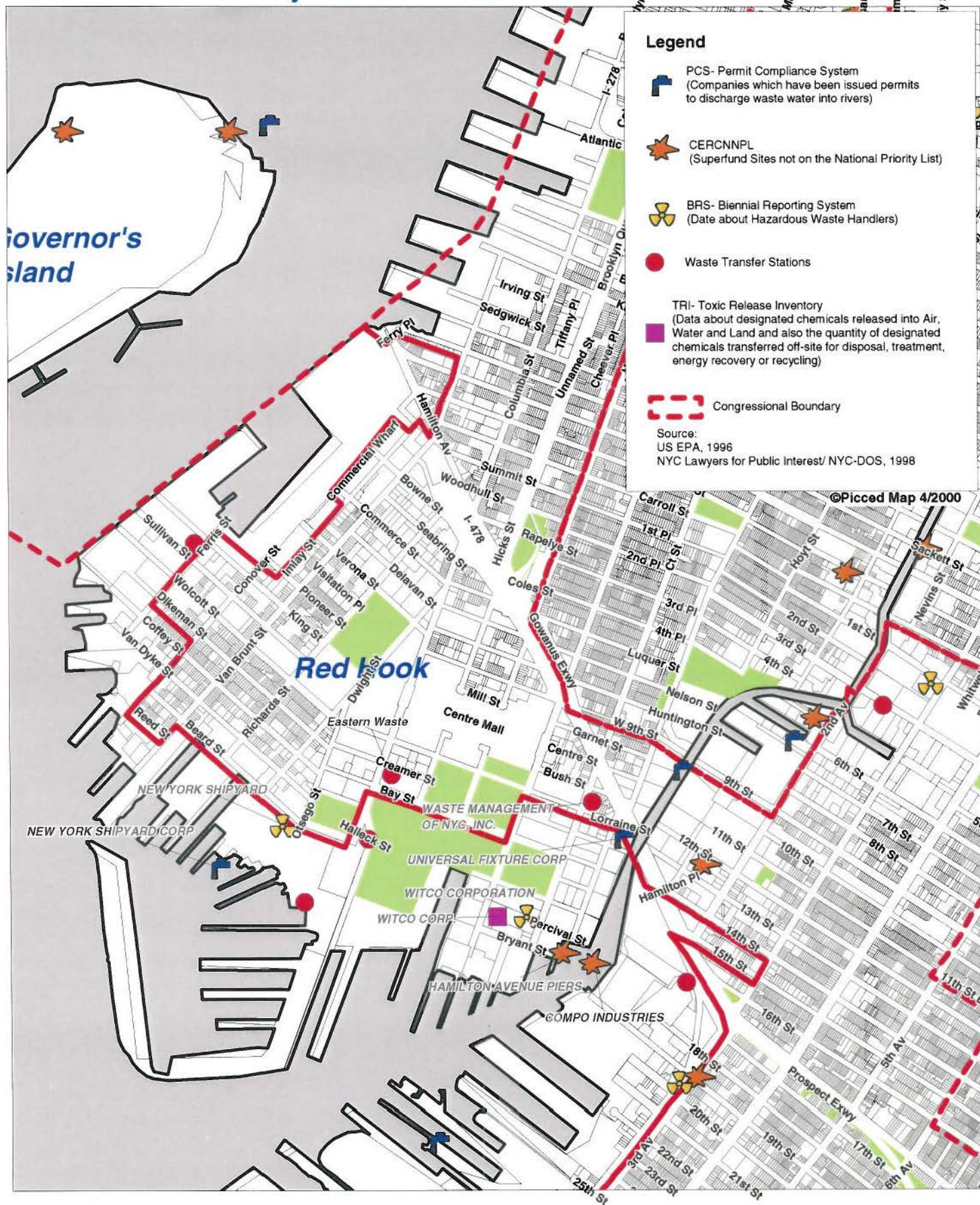
Attachments

Red Hook

Environmentally Sensitive Sites

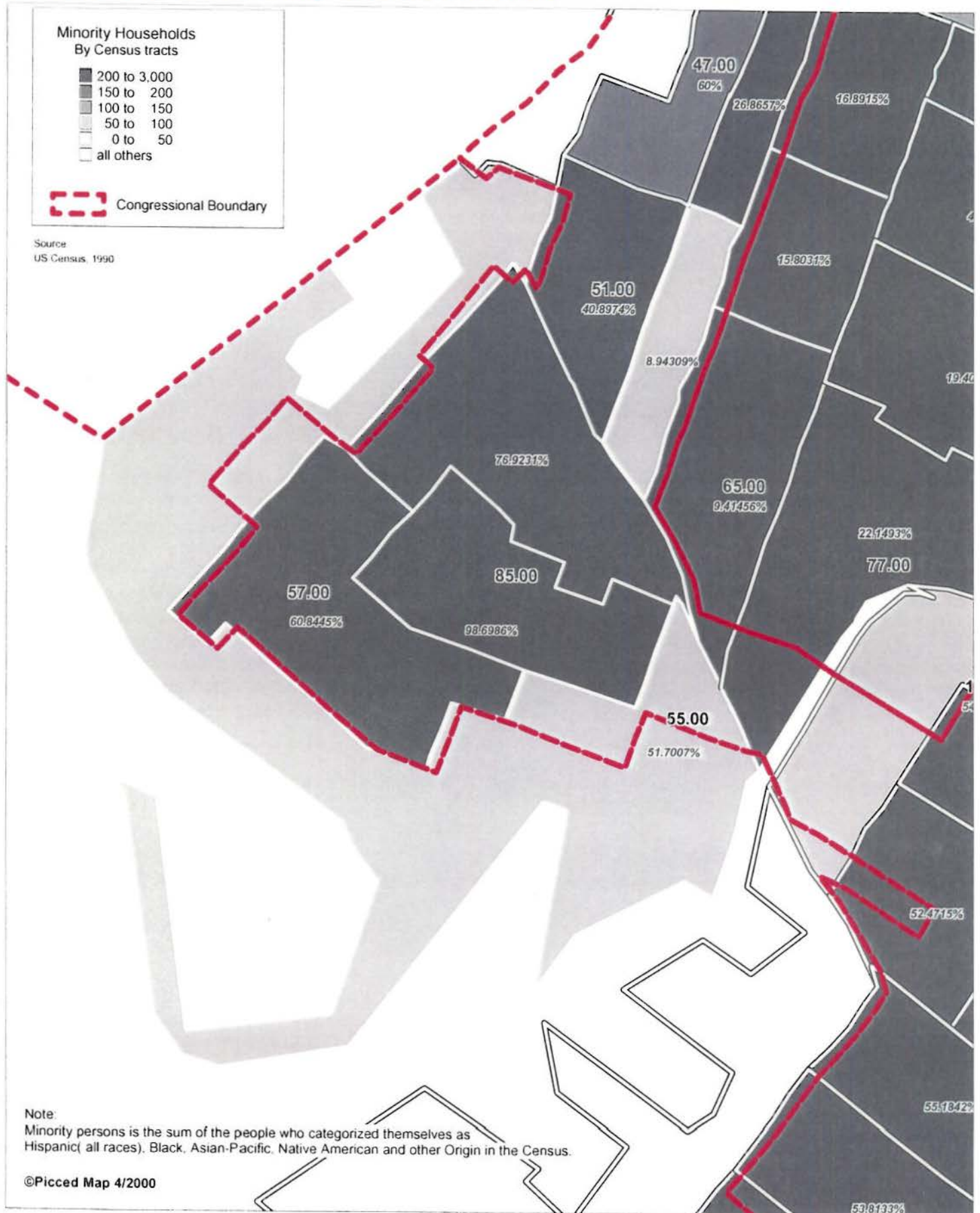


Environmentally Sensitive Sites



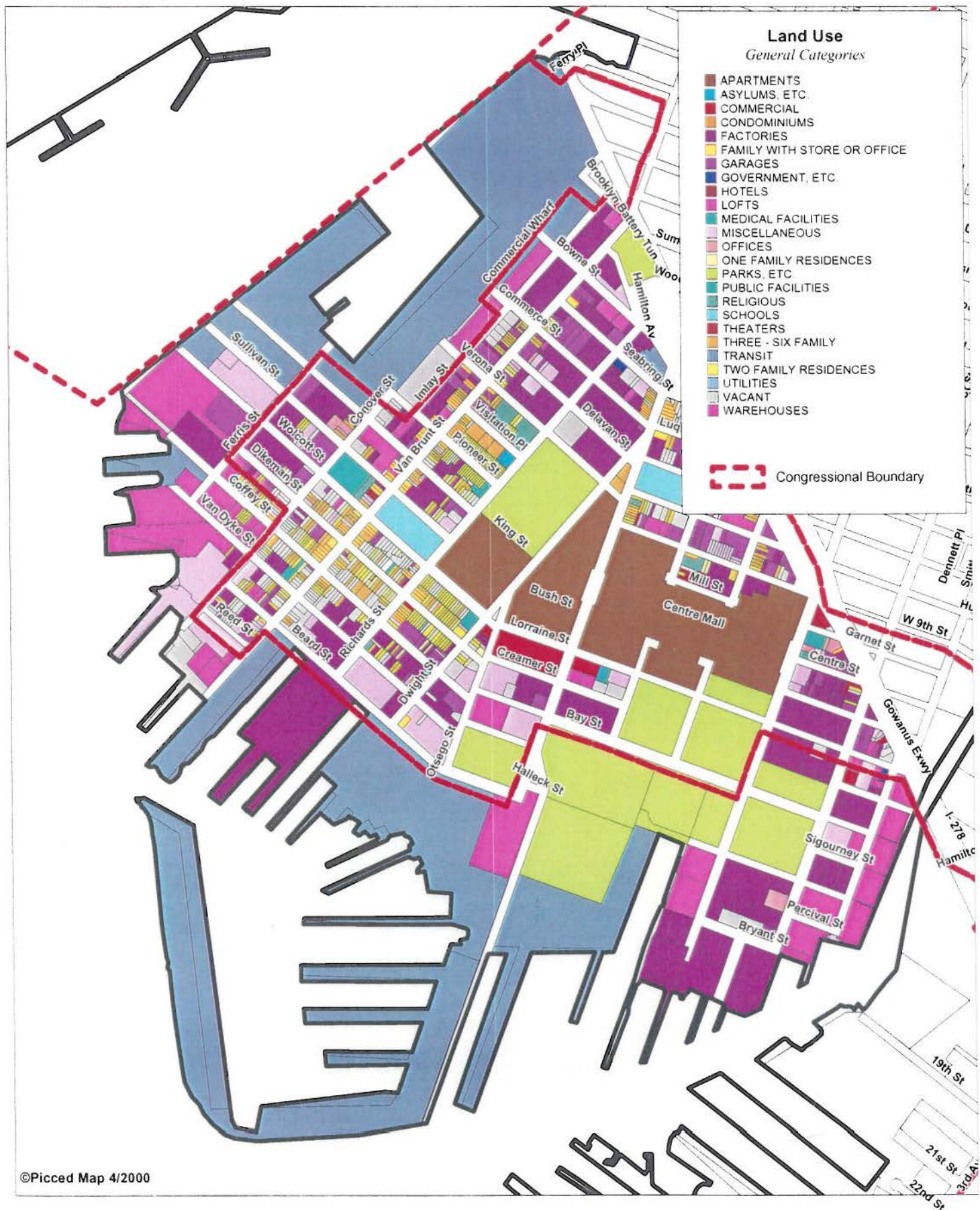
Red Hook

Red Hook Minority Households



Red Hook

Land Use



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 34

-----X
In the Matter of the Application of

RED HOOK CIVIC ASSOCIATION, RED HOOK GROUPS
AGAINST GARBAGE SITES, JOCELYN PHILLIPS, the
HONORABLE ANGEL RODRIGUEZ, the HONORABLE
NYDIA M. VELAZQUEZ, the HONORABLE HOWARD
GOLDEN, the HONORABLE MARTIN CONNOR, the
HONORABLE JOAN MILLMAN, the HONORABLE FELIX
W. ORTIZ, COMMUNITY BOARD NO. SIX, BROOKLYN,
ELIZABETH ROSE DALY and RALPH PERFETTO,

Petitioners,

INDEX NO. 102618/2000

-against-

KEVIN P. FARRELL, in his capacity as COMMISSIONER
of the NEW YORK CITY DEPARTMENT OF SANITATION
and the NEW YORK CITY DEPARTMENT OF SANITA-
TION, BROOKLYN CRUSHED MATERIALS, INC., and
ROBERT P. PEREZ, individually,

Respondents.

-----X
PHYLLIS GANGEL-JACOB, J.:

In this proceeding pursuant to CPLR Article 78 and CPLR 3001 petitioners seek a
declaration that: (1) the issuance of a permit to respondent Brooklyn Crushed Materials, Inc.
("BCM") for the proposed fill material solid waste transfer station at 640 Columbia Street,
Brooklyn, New York (the "Transfer Station"), by respondents Kevin P. Farrell and the New York
City Department of Sanitation (collectively "DOS"), without having performed an environmental
review as required by the State Environmental Quality Review Act ("SEQRA") (Environmental
Conservation Law ["ECL"] Article 8) and regulations promulgated thereunder (6 NYCRR Part
617), was unlawful, arbitrary, capricious and an abuse of discretion; (2) DOS issued the permit

in violation of the siting regulations for new and expanded solid waste transfer stations (the "siting regulations"), codified at Chapter 4 of Title 16 of the Rules of the City of New York ("RCNY"); (3) DOS does not have the authority to issue a permit because the siting regulations are invalid under Local Law 40 (New York City Administrative Code § 16-131[b]) and SEQRA; (4) all permits issued to BCM for the transfer station are null and void as in violation of the siting regulations, Local Law 40 and SEQRA; and (5) enjoining all activity at the site of the Transfer Station.

The following assertions are taken from the Petition and the Amended Petition in this matter:

Petitioner Red Hook Civic Association ("RHCA") is a 15-year-old membership organization comprised of residents, workers, and business owners from the Red Hook community of Brooklyn. RHCA's members live and work in the vicinity of at least six solid waste transfer stations.

Petitioner Groups Against Garbage Sites ("GAGS") is a coalition of approximately 20 Red Hook-based member organizations, including a Parent Teacher Association, community and social organizations, senior citizens groups, block associations, and business associations. GAGS' members live and work in the vicinity of at least six solid waste transfer stations.

Petitioner Jocelyn Phillips, a member of GAGS, is a parent and homeowner who resides in Red Hook and is the past president of the Parent Teacher Association of the Patrick Daly School in Red Hook.

Petitioner Hon. Angel Rodriguez is a City Councilman for the 38th District, which covers

Red Hook and other areas in Brooklyn.

Petitioner Hon. Nydia M. Velazquez is a member of the United States House of Representatives for the 12th Congressional District, which covers Red Hook and other areas in Brooklyn.

Petitioner Hon. Howard Golden is President of the Borough of Brooklyn, and represents the residents and the entire geographical area of the Borough of Brooklyn, including Red Hook. In his affidavit in support of the Amended Petition, which was made in both his capacities as President of the Borough and as a citizen residing in the Borough of Brooklyn, Mr. Golden attests: (1) the permit for the Transfer Station issued by DOS to BCM on October 14, 1999 "was issued without complying with, and in violation of, the State Environmental Quality Review Act (SEQRA), the rules and regulations promulgated thereunder, and the City Environmental Quality Review (CEQR)" (Golden Affidavit sworn to March 7, 2000, ¶ 10); (2) in accordance with SEQRA and CEQR and their regulations, DOS was required to conduct an environmental assessment of the impacts of the Transfer Station, and DOS's failure to comply with SEQRA and CEQR "ensures that the significant negative environmental impacts associated with the siting, construction and operation of this facility are not disclosed" (*id.*, ¶ 12); and (3) "BCM's stated dust control measures are wholly inadequate[since] there is currently no source of water at this location based upon review of [the State Department of Environmental Protection's] records that is capable of controlling dust from 20,000 cubic [yards] of fill material" (*id.*, ¶ 13).

Petitioner Hon. Martin Connor is a member of the New York State Senate for the 25th Senatorial District in the Borough of Brooklyn, and represents the residents of Red Hook.

Petitioner Hon. Joan Millman is a member of the New York State Assembly for the 52nd Assembly District in the Borough of Brooklyn, and represents the residents of Red Hook.

Petitioner Hon. Felix W. Ortiz is a member of the New York State Assembly for the 51st Assembly District in the Borough of Brooklyn, and represents the residents of Red Hook.

Petitioner Community Board No. Six in Brooklyn represents the community and residents of Red Hook, and has the responsibility to review land use actions, monitor services, perform community planning, and hold public hearings regarding matters that affect the community.

Petitioner Elizabeth Rose Daly is the Democratic State Committeewoman for the 52nd Assembly District in the Borough of Brooklyn, and represents the party-enrolled residents of Red Hook.

Petitioner Ralph Perfetto is the Democratic State Committeeman for the 52nd Assembly District in the Borough of Brooklyn, and represents the party-enrolled residents of Red Hook.

Respondent New York City Department of Sanitation is the agency responsible for the collection and management of solid waste in New York City. The Department of Sanitation issued the permit which is the subject of this proceeding.

Respondent Kevin P. Farrell is the Commissioner of the Department of Sanitation.

Respondent BCM is a New York corporation, with its principal place of business in Brooklyn. BCM seeks to operate the transfer station.

Respondent Robert P. Perez is the principal officer, director and owner of BCM.

On June 25, 1998, BCM filed a registration for the proposed Transfer Station with the New York State Department of Environmental Conservation ("DEC"). The quantity of waste proposed to be processed each day was approximately 5,000 tons, with a site storage capacity of approximately 20,000 tons. The Transfer Sstation's location is that of a previously operated Construction and Demolition ("C&D") debris processing facility,¹ which was shut down by DOS in November 1996. Although the site has not been used since that time, it was never properly closed, cleared, or cleaned up. DEC advised BCM that several existing violations at the site had to be resolved before BCM's registration would be accepted.

Nevertheless, on September 9, 1998, BCM applied to DOS for a permit for the proposed transfer station. That application indicates an approximate amount of fill material to be processed each day of 1,000 tons which will require up to 110 truck trips to and from the Transfer Station each day.

Pursuant to 16 RCNY § 4-07(b), an application for a permit to operate a fill material transfer station must include 17² items and groups of items. In addition, 16 RCNY § 4-07(c) requires that "[a]ny initial application for a transfer station permit shall include all documentation required pursuant to this section in one single package. This package shall constitute the transfer station permit application."

According to petitioners:

BCM's application failed to include 12 out of the 17 required

¹Recycling Unlimited, Inc. operated the previous C&D debris processing facility.

²The number is actually 16. Section 4-07(b)(17) provides that, "[a]t the request of the Commissioner, the applicant shall supply any additional information that is reasonably necessary to clarify that the transfer station is capable of complying with § 4-08 of this subchapter."

items, including but not limited to: 1) a Certificate of Occupancy as required by 16 RCNY § 4-07(b)(5); 2) documentary evidence that all penalties imposed upon the applicant or property owner were satisfied pursuant to 16 RCNY § 4-07(b)(6); 3) proof of workers' compensation coverage pursuant to 16 RCNY § 4-07(b)(8); 4) a written and notarized acknowledgement [*sic*] that the applicant or owner can be held primarily liable for the removal of all material from the transfer station pursuant to 16 RCNY § 4-07(b)(9); 5) copies of all materials submitted to the Department of Environmental Conservation pursuant to 16-6 [*sic*] RCNY § 4-07(b)(1); and 6) a site plan pursuant to 16 RCNY § 4-07(b)(1). See DOS letter dated September 20, 1998, attached hereto as Exhibit F. (Verified Amended Petition, ¶ 24).

The September 20, 1998 letter referred to from DOS to BCM specifically and clearly enumerates the required documentation which was not included with BCM's application.

I. The Permit

The permit challenged herein was issued on October 14, 1999 (the "Permit") and had a term of "90 days from the date of issuance (subject to automatic extensions as specified below)" (Temporary Fill Material Solid Waste Transfer Station Permit dated October 14, 1999, at 1). The initial 90-day period expired on January 12, 2000. However, the Permit also provides, "[i]f a determination on issuance of a final permit has not been made at the expiration of this permit, this permit shall be deemed extended for an additional ninety day period or until such determination is made, whichever is first" (*ibid.*). Since a determination on issuance of a final permit has not yet been made, even though the second 90-day period expired on April 11, 2000, the Permit is now in its third 90-day period which will expire on July 10, 2000 unless a determination on issuance of a final permit is made before then. There does not appear to be any provision which limits the number of times a permit may be extended, or the length of the term of a permit, other than 16 RCNY § 4-07(f), which simply provides, "[a] permit issued pursuant to this section shall be for a term not to exceed one year" Therefore, unless a determination on

issuance of a final permit were to be made in the interim, the Permit's current term shall expire for the last time on October 9, 2000 (since October 8th, the actual 90th day, falls on a Sunday, and the Permit was first issued on October 14, 1999).

Notwithstanding, I find that the Permit is defective on its face in so far as it fails to comply with 16 RCNY § 4-07(f): "A permit issued pursuant to this section ... shall specify the volume of fill material permitted to be *received, processed and stored* by the transfer station (emphasis added)." The only volume specified in the Permit is that "[t]he volume of fill material *stored* must not exceed 20,000 cubic yards (emphasis added)."

I find the Permit is also defective on its face because it does not comply with 16 RCNY 4-08(u), which provides, "[t]he permittee shall be allowed to receive at the transfer station only the specific types of fill material set forth within the permit." The Permit lacks any specification of the type or types of fill material allowed at the Transfer Station. Paragraph (5) of the Permit, which sets forth, "[o]nly fill material can be dumped at the transfer station site as defined by the Department's rules and regulations," does not fill the requirement of 16 RCNY § 4-08(u), since it merely articulates that the Transfer Station must operate in accordance with 16 RCNY § 4-08(r).

Further, there is nothing to show that a valid certificate of occupancy ("C of O") now supports, or has ever supported, the Permit. Both the initial temporary C of O for the transfer station which expired on November 12, 1999, and the temporary C of O issued on January 10, 2000, which expired on April 9, 2000, are no longer extant. There is no indication that any further C of O has either been applied for or issued. In addition, neither C of O was valid because both of the expired C of O's include the statement: "Open yard may be used for

transfer of construction and demolition debris." This is in direct violation of 16 RCNY § 4-08(r), which mandates: "The presence at a [fill material] transfer station of any material other than fill material is prohibited." Thus, no valid C of O supports the Permit in violation of 16 RCNY §4-07(b)(4) and, although currently extant, the Permit for the Transfer Station is defective on its face.

The Permit was also improperly issued. The application for the Permit failed to comply with 16 RCNY § 4-07(c). Although respondents argue that the term "application" is not defined in the regulations, 16 RCNY § 4-07(c) requires that "[a]ny initial application for a transfer station permit shall include all documentation required pursuant to this section in one single package. This package shall constitute the transfer station permit application." Thus, the specific required content of "any initial application" is set forth in particular detail in the regulations; the regulations require that "all documentation required pursuant to this section" shall be included "in one single package"; and the regulations further specify that "[t]his package shall constitute the transfer station permit application." The evidence submitted in this proceeding, including the averments of respondents themselves, clearly shows that BCM's application was far from complete on the date on which respondents allege it was filed. In fact it has been shown that the required documentation continued to dribble in to DOS for no less than eight months thereafter.

I find therefore that the issuance of the Permit by DOS to BCM was arbitrary, capricious and an abuse of discretion, in that DOS failed to comply with the clear mandates of its own regulations.

II. The Type I/Type II Action Question

Under the regulations promulgated under SEQRA, there are three broad categories of agency actions: Type I, Type II, and Unlisted.

Type I actions are "those actions that an agency determines may have a significant adverse impact on the environment and require the preparation of an [Environmental Impact Statement]" (6 NYCRR 617.4[a][1]). "For Type I actions, a full [Environmental Assessment Form] ... must be used to determine the significance of such actions" (6 NYCRR 617.6[a][2]). Type II actions are those which "have been determined not to have a significant impact on the environment or are otherwise precluded from environmental review under Environmental Conservation Law, article 8" (6 NYCRR 617.5[a]). An Unlisted action is one which has not been identified as either a Type I or Type II action (6 NYCRR 617.2[ak]).

Respondents maintain that the issuance of the Permit was a Type II action not subject to environmental review because BCM's facility will be a "replacement, rehabilitation or reconstruction of a structure or facility, in kind, on the same site" (6 NYCRR 617.5[c][2]) as Recycling Unlimited Inc.'s facility. However, this assessment is inaccurate in the extreme.

Section 360-1.2 of 6 NYCRR provides definitions for many of the terms used in such cases, including "solid waste management facility," which means, "any facility employed beyond the initial solid waste collection process and managing solid waste, including but not limited to: ... transfer stations; ... [and] C&D debris processing facilities ..." (6 NYCRR 360-1.2[b][158]). Within the overall category of "solid waste management facility," there are distinct definitions for "construction and demolition debris processing facility" (6 NYCRR 360-1.2[b][39]) and "[t]ransfer station" (6 NYCRR 360-1.2[b][172]). Part 360 of 6 NYCRR, which

deals with "Solid Waste Management Facilities," also has separate subsections for "transfer stations" (6 NYCRR 360-11) and for "construction and demolition debris processing facilities" (6 NYCRR 360-16). C&D debris is specifically precluded from transfer stations, pursuant to 6 NYCRR 360-11.4(a), which reads, "No ... construction and demolition debris shall be accepted [at solid waste transfer stations] unless specifically approved by the department." Section 4-08(r) of 16 RCNY also forbids C&D debris at a fill material transfer station. That section provides: "The presence at a [fill material] transfer station of any material other than fill material is prohibited."

Thus, by definition, as well as by particular prohibition, the change in use from a C&D debris processing facility to a fill material transfer station cannot be considered a "replacement ... of a ... facility, in kind, on the same site" (6 NYCRR 617.5[b][2]).

The case law cited by respondents does not support their argument that a transfer station is a "replacement in kind" of a C&D debris processing facility. In *Manhattan Valley Neighbors for Permanent Housing for the Homeless v Koch* (168 AD2d 262, 263 [1st Dept 1990], *appeal denied* 77 NY2d 806 [1991]), the First Department held, "[i]n order to constitute replacement in kind, exact replication is not required; a replacement in kind will be effected if a new facility has a *substantially similar use* to the old facility [emphasis added]." In accordance with the definitions and prohibitions set forth above, C&D debris processing facilities and transfer stations do not constitute a "substantially similar use." The cases which do find a replacement in kind, moreover, do not involve the leap of logic that respondents invite this court to undertake. *Matter of Civic Assn. of Utopia Estates, Inc. v City of New York* (175 Misc 2d 779 [Sup Ct, Queens County 1998], *affd* 258 AD2d 650 [2d Dept 1999]) involved the replacement of sewer

lines with sewer lines of greater capacity; *Matter of New York City Coalition for the Preservation of Gardens v Giuliani* (175 Misc 2d 644 [Sup Ct, NY County 1997], *affd* 246 AD2d 399 [1st Dept 1998]) involved replacing housing with housing, although the land had been temporarily used as community gardens in the interim; *Matter of Anderberg v New York State Dept. of Environmental Conservation* (141 Misc 2d 594 [Sup Ct, Albany County 1988]) involved the replacement of a bridge with a bridge of more modern construction materials and design.

"The basic purpose of SEQRA is to incorporate the consideration of environmental factors into the existing planning review and decision-making processes of State, regional and local governmental agencies at the earliest possible time. (ECL 8-0109; 6 NYCRR 617.1[c])" (*Matter of McKelvey v White*, 150 Misc 2d 39, 42 [Sup Ct, Albany County 1991]).

"SEQRA's procedures are intended to minimize to the greatest degree possible the adverse environmental consequences of any project that is approved" (*Matter of Sun Beach Real Estate Dev. Corp. v Anderson*, 98 AD2d 367, 370 [2d Dept 1983], *affd* 62 NY2d 965 [1984]).

Moreover, "[t]he criteria for what constitutes a Type II action cannot be considered in a vacuum" (*Matter of Town of Bedford v White*, 204 AD2d 557, 559 [2d Dept 1994]), and "[i]n view of the fact that SEQRA entrusts some initial classifications of Type II actions to agencies, it is imperative [that] this trust not be taken lightly and that the reason for the classification be documented" (*Matter v London v Art Commission of City of New York*, 190 AD2d 557, 559 [1st Dept], *lv denied* 82 NY2d 652 [1993]), quoting *Matter of Town of Bedford v White*, 155 Misc 2d 68, 72 [Sup Ct, Westchester County 1992], *affd* 204 AD2d 557 [2d Dept 1994]).

Here, the only reason given for classifying the grant of the Permit for BCM's transfer station as a Type II action was that BCM's facility would be a replacement in kind on the

same site as Recycling Unlimited Inc.'s ill fated C&D debris processing facility. That determination was in error, and may not be sustained. Since "[t]he proper remedy is annulment of the determination [citations omitted]" (*Matter of McKelvey v White, supra*, at 43), petitioners' application that the issuance of the Permit to BCM by DOS, without having performed an environmental review as required by SEQRA and regulations promulgated thereunder, be declared unlawful, arbitrary, capricious, and an abuse of discretion, is granted, and the Permit is hereby declared null and void.

III. The Siting Regulations

In light of the above, the issues whether the Permit was issued in violation of the siting regulations, and whether DOS has authority to issue a permit under the siting regulations need not be addressed. I decline to address these questions for the additional reason that the issue of the validity of the siting regulations remains *sub judice*, while the parties in *Organization of Waterfront Neighbors v Carpinello*, Index No. 103661/99, conduct mediation to resolve the issues raised therein.

IV. The Injunction

Petitioners ask that "all activity at the site of the transfer station" be enjoined. A party may obtain preliminary injunctive relief if the party "sufficiently demonstrate[s] a likelihood of success on the merits, irreparable injury, and a balancing of the equities in [its] favor" (*Leiman v 310 West 56th St. Corp.*, ___ AD2d ___, 705 NYS2d 229 [1st Dept 2000]).

Petitioners have demonstrated and I have found that the Permit to operate BCM's transfer station is invalid in itself, and that it was invalidly issued. Thus, success on the merits is evident. The other two prongs of the test are also satisfied by reason of the fact that operation of

the Transfer Station without any prior environmental impact study will adversely affect petitioners and the Red Hook community within the site's environs, and the equities favor petitioners' and the Red Hook community's right to live and work there without having to contend with a Transfer Station that does not conform with the applicable statutes and regulations.

Accordingly, that branch of the petition which seeks to enjoin all activity at the site of the Transfer Station is granted to the extent that respondents and any of them are hereby enjoined and prohibited from conducting all activity associated with the operation of the Transfer Station at the location at issue, in the absence of a valid, and validly issued, permit and C of O, and prior to the conduct of an environmental impact assessment as required by SEQRA and the regulations promulgated thereunder.

Accordingly, the petition is granted to the extent that it is hereby

ORDERED, ADJUDGED AND DECLARED, that the issuance of a permit to respondent Brooklyn Crushed Materials, Inc. for the fill material solid waste transfer station located at 640 Columbia Street, Brooklyn, New York, by respondents Kevin P. Farrell and the New York City Department of Sanitation, without having performed an environmental review as required by the State Environmental Quality Review Act, and regulations promulgated thereunder was unlawful, arbitrary, capricious and an abuse of discretion; and it is further

ORDERED, ADJUDGED AND DECLARED that all permits issued by respondents Kevin P. Farrell and the New York City Department of Sanitation to Brooklyn Crushed Materials, Inc. for the transfer station located at 640 Columbia Street, Brooklyn, New York, are null and void; and it is further

ORDERED that that branch of the petition which seeks to enjoin "all activity at the site of the transfer station" is granted to the extent that respondents and any of them are enjoined and prohibited from conducting all activity associated with the operation of the Transfer Station, in the absence of a valid, and validly issued, permit and certificate of occupancy, and prior to the environmental impact assessment required by SEQRA and the regulations promulgated thereunder.

This is the decision, order and judgment of the court.

Dated: 5-9-00

ENTER:



J.S.C.